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No. 194.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

UNITED STATES EX RELATIONE WILLIS C. WEST,
plaintiff in error,

v.

ETHAN A. HITCHCOCK, SECRETARY OF THE INTERIOR,
defendant in error.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

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STATEMENT.

August 5, 1901, the relator (plaintiff in error here), claiming to be an adopted member of the Wichita Indian tribe, filed his petition in the Supreme Court of the District of Columbia, praying the issuance of the writ of mandamus to compel Ethan A. Hitchcock (defendant in error here), as Secretary of the Interior, to approve the relator's selection and application for allotment of a certain tract of 160 acres out of the lands (formerly embraced in Indian Territory,

now part of Oklahoma) ceded to the United States by the Wichita and affiliated bands of Indians under the agreement of June 4, 1891 (see Appendix), ratified by the act of Congress of March 2, 1895 (28 Stat., 876, 895–897); and rule to show cause followed. (Record, p. 4, et seq.)

In response, a demurrer to the petition was interposed (record, p. 2), which, by an order entered August 27, 1901, was sustained, the rule to show cause was discharged, and the petition dismissed. Upon appeal, however, that order was reversed (19 App. D. C., 333), and the cause remanded "for further proceedings therein according to law."

Thereupon the defendant below filed his answer to the petition (record, pp. 10–11), wherein, among other things, after reciting the duty laid upon him, as Secretary of the Interior, in the premises, he averred that, being without knowledge of relator's status at the time of his application for allotment, defendant, as such Secretary, examined and considered relator's application and all the evidence and proofs presented by him to support it, including all the matters now set forth in the petition, together with such other evidence and proofs bearing thereon as were embodied in the public records and files of the Indian Bureau and Department of the Interior, and that upon full consideration thereof the defendant, as Secretary of the Interior, did, on the 3d day of July, 1901, reach and announce a conclusion and decision that relator was not, by nativity or adoption, a member of the Wichita and affiliated bands of

Indians, and for that reason was not entitled to an allotment, and thereupon denied relator's application.

The answer considered, relator filed motion for the issuance of the peremptory writ, and later a demurrer, which were successively overruled. (Record, pp. 12–14.)

Relator thereafter filed his several pleas (four in number), to which defendant demurred, the demurrer being overruled as to the first plea and sustained as to the others; and on the first plea, as follows, issue was joined. (Record, pp. 14–16.)

> The relator says that the defendant, as Secretary of the Interior, did not, by the decision alleged in the answer to have been made by him on July 3, 1901, decide that the relator was not by nativity or adoption a member of the Wichita or affiliated band of Indians, and for that reason deny him the said allotment.

Upon this issue the cause was tried to the court, to maintain which issue, on his part, relator offered in evidence a duly certified copy of the Secretary's said decision of July 3, 1901, and defendant, on his part, offered in evidence official exemplifications of the correspondence, decisions, regulations, etc., referred to in his answer and set out in the bill of exceptions here presented, as well as of the decision of July 3, 1901. To all save the last mentioned of defendant's evidence relator objected, and saved his exceptions to its admission, as set out. (Record, p. 22 et seq.)

Upon all the evidence the court found that the defendant Secretary did reach and announce a conclu-

sion and decision that relator was not, by nativity or adoption, a member of the Wichita and affiliated bands of Indians, therefore not entitled to an allotment, and thereupon denied relator's application for allotment, and that the defendant, as Secretary of the Interior, disapproved relator's application for membership by adoption in the Wichita Indian tribe, and held that the evidence was insufficient in law to support a finding for the relator. Wherefore, relator's prayer for the issuance of the peremptory writ was denied, the rule to show cause discharged, and the petition dismissed. (Record, p. 16.) This judgment was affirmed by the Court of Appeals (26 App. D. C. 290; see record, pp. 46–51), whereupon the relator sued out the pending writ of error.

The trial court delivered a written opinion (Record, p. 17 et seq.), in which it was ruled as matter of law:

> (1) That before any person can be entitled to an allotment of land under the act of Congress approved March 2, 1895, ratifying the agreement of June 4, 1891, as an adopted member of the Wichita or any affiliated band of Indians, such person must show that his adoption as such member has been approved by the Secretary of the Interior.
>
> (2) The court further finds, as matter of law, that it was the duty of the Secretary of the Interior, in passing upon the application of the relator for an allotment of land, to determine whether or not said relator was within the category of persons entitled to such allot-

ment and that the decision of the defendant in that regard can not be reviewed by this court in this proceeding.

These conclusions were reached by the court after opposing counsel had been heard in oral argument as to the power and authority of the Secretary of the Interior to control the action of the Wichita tribe of Indians with respect to adoption of the relator and to determine the latter's status.

ARGUMENT.

Whilst counsel for the relator, at page 6 of their brief here, assign several matters as error, the argument with respect thereto is devoted principally to the two propositions presented by the record, as follows:

That the demurrer to the answer should have been sustained; and

That the evidence offered on behalf of the defendant, the Secretary of the Interior, was inadmissible.

THE ANSWER AND DEMURRER.

The allegations in defendant's answer to the petition, that he had, on July 3, 1901, reached and announced a conclusion and decision that relator was not, by nativity or adoption, a member of the Wichita and affiliated bands of Indians and therefore not entitled to an allotment, are sufficient to defeat the application for the writ.

The action of the defendant, as Secretary of the Interior, in refusing to approve the relator's application for an allotment of land, involved a determination by the Secretary of the question whether the

relator was within the category of persons entitled to allotment. The Secretary having alleged in his answer that he had decided that relator was not within this category, the writ of mandamus will not issue.

The relator undertook to raise this question in the trial court, first, by a motion for the issuance of a peremptory writ of mandamus, and then by a demurrer to the answer.

The motion for the peremptory writ upon the filing of the answer was the mode adopted for the purpose of contesting the validity of an answer to the alternative writ in the old days when a demurrer could not be filed to an answer in mandamus proceedings. However, this motion has no place in the present practice; and as no exception was taken to the action of the court in overruling it, it may be dismissed without consideration. This leaves for discussion the question raised by the demurrer to the answer.

Article II of the agreement of June 4, 1891, relied upon by relator, provides that—

> there shall be allotted to each and every member of said Wichita and affiliated bands of Indians in the Indian Territory, native and adopted, 160 acres of land—

and then prescribes certain restrictions with respect to the land to be selected—for instance, that half of it should be grazing lands and that no land should be selected which had been or should be set apart for certain specified purposes.

Article IV of the agreement provides:

> When said allotments of land shall have been selected and taken as aforesaid, and approved by the Secretary of the Interior, the title thereof shall be held in trust for the allottees, respectively, for a period of twenty-five years. * * *

The relator is careful to aver in his petition that he is a legally adopted member of the Wichita tribe, and he alleges at length many things upon which he relies to sustain his assertion. He is also careful to allege that his selection of land is within all the provisions and requirements of the agreement and the act of Congress ratifying it.

When this case was first before the Court of Appeals, upon the demurrer to the petition, that court said, through Mr. Justice Morris (*supra*, p. 345):

> It is not sought to control the judgment of the Secretary in any matter calling for the exercise of judgment. It was for him to determine whether the relator was within the category of persons entitled to an allotment of land, whether the land selected was of the kind which the relator was entitled to select, whether it interfered with the rights of any other persons, and all other preliminary matters going to the validity or invalidity of the relator's action. But it is admitted by the pleadings that all this was done, and that no question whatever in that regard remains to be determined; and the legal interpretation of the action of the Department is that, although

> the relator has been adjudged to be entitled to receive his allotment, approval is arbitrarily withheld, and no cause whatever is assigned for the refusal.

Said that court, through the same justice, in deciding the similar case of *United States ex rel. Cox* v. *Hitchcock* (19 App., D C., 347, 352):

> The right of approval reserved to the Secretary by the act of Congress, and which, of course, involves the right of disapproval, is not a mere ministerial duty. Plainly it requires the exercise of judgment and discretion. It requires of the Secretary to determine whether the land selected is subject to selection, and whether all the prerequisites required by the law to be performed in order to justify his approval have in fact been performed. In the West case it appeared definitely and positively that these prerequisites had been performed, that the matter was no longer one of consideration by the Secretary, and that all that remained to be done was a mere ministerial thing.

When this case was remanded to the trial court, and the demurrer there overruled, the defendant filed an answer in which he set forth that he had examined and considered the application of the relator for approval of his selection of land, and all evidence and proof presented in support thereof, including all the matters set forth in the petition, and also such other evidence bearing thereon as was embodied in the pub-

lic records and files of the Indian Bureau and the Department, and upon full consideration thereof—

> did, on the 3d day of July, 1901, reach and announce a conclusion and decision that the relator was not, by nativity or adoption, a member of the Wichita and affiliated bands of Indians, and for that reason was not entitled to an allotment under the agreement so ratified, and thereupon this defendant, as Secretary of the Interior, denied the application of the relator for said allotment.

Counsel for relator argue that this answer is insufficient in that it does not deny the averments of the petition that the relator is in all respects an adopted member of the Wichita tribe of Indians.

This contention is without foundation, however, for, as it is shown, the answer avers an adjudication by the defendant, as Secretary of the Interior, upon certain evidence therein referred to, whereby the relator's alleged status of a legally adopted member of the Wichita tribe is clearly denied and his claimed title to an allotment is effectually negatived.

The Court of Appeals had already said in the case, too, that it was for the Secretary to determine whether the relator was such an adopted member; and of course it is elementary law that when in such a case the Secretary has determined that or any question so committed to him it is immaterial whether his determination is right or wrong; that is a matter which can not be considered by the

courts, and his decision can not be reviewed by them.

In the case of *De Cambra* v. *Rogers* (189 U. S., 119, 122) it is said:

> It is hardly necessary to say that when a decision has been made by the Secretary of the Interior courts will not entertain an inquiry as to the extent of his investigation and knowledge of the points decided, or as to the methods by which he reached his determination.

In *Riverside Oil Co.* v. *Hitchcock* (190 U. S., 316, 325) this court said:

> Mandamus has never been regarded as the proper writ to control the judgment and discretion of an officer as to the decision of a matter which the law gave him the power and imposed upon him the duty to decide for himself. The writ never can be used as a substitute for a writ of error. Nor does the fact that no writ of error will lie in such a case as this, by which to review the judgment of the Secretary, furnish any foundation for the claim that mandamus may therefore be awarded. The responsibility as well as the power rests with the Secretary, uncontrolled by the courts.

The decision of the Court of Appeals in this case, that the duty of the Secretary of the Interior in approving or disapproving the selection in question was one involving the exercise of judgment and discretion, is fully supported by the authorities. *United*

States v. *Missouri, etc., Ry.* (141 U. S., 358, 375); *Wisconsin Central R. R. Co.* v. *Price Co.* (133 U. S., 496, 511); *Runkle* v. *United States* (122 U. S., 543, 557).

Mandamus should not issue in cases of doubtful right, but only when the legal right of the party to that which he demands has been clearly established. *Life and Fire Insurance Co.* v. *Wilson's Heirs* (8 Pet., 291, 302); *Reeside* v. *Walker* (11 How., 272, 289).

THE PLEAS TO THE ANSWER.

The record shows that relator filed four pleas to defendant's answer, as to three of which a demurrer was sustained.

Whilst this action of the trial court is assigned in their brief as error, the point is not argued by counsel, and it is sufficient to say that the ruling of the court in sustaining the demurrer was on the ground that the three pleas amounted to the general issue. All evidence which could have been offered under them was equally admissible under the first plea, the demurrer to which was overruled.

ADMISSIBILITY OF DEFENDANT'S EVIDENCE.

To determine or explain what has actually been decided by a tribunal exercising judicial powers the entire record upon which the decision was reached may be examined and considered.

Neither party having required in writing a trial by jury, the issue raised by the first plea was, under the provisions of section 1278 of the "act to establish a code of law for the District of Columbia" (31 Stat., 1189, 1390), tried by the court without a jury.

This plea presented the single question, whether the Secretary of the Interior did decide, as he averred in his answer, that the relator was not a member, native or adopted, of the Wichita or affiliated bands of Indians.

The relator offered in evidence a copy of the decision of the Secretary of July 3, 1901, and there rested. (Record, pp. 22–24.) The defendant thereupon introduced his evidence.

The court found from the evidence adduced that the defendant did reach and announce a conclusion and decision that the relator was not, by nativity or adoption, a member of the Wichita and affiliated bands of Indians and therefore was not entitled to an allotment, and that thereupon defendant denied relator's application for such allotment. The court further found that the defendant disapproved relator's adoption by the Wichita tribe; and the correctness of this finding is virtually conceded on page 32 of counsel's brief. The court also ruled that the evidence was insufficient to support a finding for relator. It is our contention here, as it was below, that these findings of fact by the trial court, in an action at law, are conclusive, equally as if they were the findings of a jury, and that, counsel for relator having failed to except to the foregoing findings, and to request any findings or rulings in their behalf, this court can not now consider whether the evidence before the trial court was sufficient to justify its findings. As these conclusions were challenged by counsel at the bar of the Court of Appeals, and seem

to be questioned here, a brief consideration will be given them at this point.

The provisions of said section 1278 of the code, pertaining to issues joined in mandamus, are in part, and so far as material here, as follows:

> Such issues shall be tried by a jury if both parties in writing require it, otherwise they shall be heard and determined by the court.

By sections 70 and 71 of the code, under subchapter III prescribing the jurisdiction, procedure, etc., of the Supreme Court of the District, the following provisions are made:

> SEC. 70. Trial by court: Issues of fact in civil causes may be tried and determined by the court without the intervention of a jury whenever the parties or their attorneys of record file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury.
>
> SEC. 71. In such case an exception may be taken to any ruling of the court during the hearing and to such finding on the ground that the evidence was insufficient in law to justify it, and may be stated in a bill of exceptions as in case of a jury trial.

It is to be observed that section 70 alone is modified by section 1278, and only with respect to the manner in which trial by jury is waived in a mandamus proceeding, and that the remaining provisions of sections 70 and 71 necessarily govern in any such proceeding

without a jury, since no contrary provision appears in the chapter devoted to the subject of mandamus.

In *Norris* v. *Jackson* (9 Wall., 125) this court considered section 4 of the act of March 3, 1865 (13 Stat., 500, 501—now substantially embodied in sections 649 and 700 of the Revised Statutes), which, after providing for the waiver of a jury trial of the "issues of fact in civil cases in any circuit court of the United States," is as follows:

> The finding of the court upon the facts, which finding may be either general or special, shall have the same effect as the verdict of a jury. The rulings of the court in the cause, in the progress of the trial, when excepted to at the time, may be reviewed by the Supreme Court of the United States upon a writ of error, or upon appeal, provided the rulings be duly presented by a bill of exceptions. When the finding is special, the review may also extend to the determination of the sufficiency of the facts found to support the judgment.

Construing those provisions, the general similarity of which to those of the two sections of the code last above mentioned is obvious, the court thus condensed the results of its examination of that statute (*supra*, pp. 128–129):

> 1. If the verdict be a general verdict, only such rulings of the court, *in the progress of the trial*, can be reviewed as are presented by bill of exceptions, or as may arise on the pleadings.

2. In such cases a bill of exceptions can not be used to bring up the whole testimony for review any more than in a trial by jury. [See sec. 71, D. C. Code.]

3. That if the parties desire a review of the law involved in the case they must either get the court to find a special verdict which raises the legal propositions, or they must present to the court their propositions of law and require the court to rule on them.

4. That objection to the admission or exclusion of evidence, or to such ruling on the propositions of law as the party may ask, must appear by bill of exceptions.

In the later case of *Miller* v. *Life Insurance Co.* (12 Wall., 285), which also was tried by the court without a jury, pursuant to the act of 1865, it was said (pp. 299–300):

Suppose the facts proved to have been as assumed by the defendants in their requests, then it might well be conceded that the judgment was for the wrong party, but the issues of fact were tried and determined by the circuit court, and the act of Congress provides that the finding of the circuit court in such cases shall have the same effect as the verdict of a jury, and the Constitution provides that no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law. Facts so tried could only be reexamined under the rules of the common law either by the granting of a new trial by the court where the issue was tried or to which the

> record was returnable, or by the award of a *venire facias de novo* by an appellate court for some error of law which intervened in the proceedings. Matters of fact found by the circuit court under such a submission can not be reexamined here, as by the express language of the act the review, when the finding is general, is confined to the rulings of the court in the progress of the trial, and even when the finding is special, nothing else is open to review except the inquiry whether the facts found are sufficient to support the judgment.

In *Kearney* v. *Case* (12 Wall., 275, 283), speaking of the same act, it was said—

> that it was the intention to enact that if parties who consent to waive a jury desire to secure the right to a review in the Supreme Court of any question of law arising in the trial, they must first file their written stipulation, *and must then ask the court to make a finding of such facts as they deem essential to the review, and ask the ruling of the court on points to which they wish to except.* If this is not done the parties consenting to waive a jury stand as they did before the statute, concluded by the judgment of the court on all matters submitted to it. [Italics borrowed.]

Further upon the propositions italicised in the foregoing quotation may be cited *Insurance Co.* v. *Sea* (21 Wall., 158, 160); *Retzer* v. *Wood* (109 U. S., 185, 188); *Martinton* v. *Fairbanks* (112 U. S., 670, 672–674); *Lehnen* v. *Dickson* (148 U. S., 71).

Prior to the act of 1865 no question decided by the court below, whether of fact or law, could be re-examined and revised by this court upon a writ of error where the parties had submitted the trial of the cause to the court without a jury; and it was deemed necessary "to require in all cases, where the parties see fit to avail themselves of the privileges of the act, a reasonably strict conformity to its regulations." *Flanders* v. *Tweed* (9 Wall., 425.) See also, *Kearney* v. *Case* (*supra*); *Gilman* v. *Ill. & Miss. Tel. Co.* (91 U. S., 603, 614); *Boogher* v. *Insurance Co.* (103 U. S., 90, 95); and authorities cited in those cases.

Objections to the admission or rejection of evidence, or to such rulings or propositions of law as may be submitted to the court, must be shown by bill of exceptions. (*Norris* v. *Jackson*; *Insurance Co.* v. *Sea*; *Martinton* v. *Fairbanks*; *supra.*)

The sections of the code above given do not, indeed, as did the act of 1865, in terms provide that in the case of a special finding "the review may also extend to the determination of the sufficiency of the facts found to support the judgment," but authorize an exception to a "finding on the ground that the evidence was insufficient in law to justify it," to "be stated in a bill of exceptions as in case of a jury trial." However, of whatever force, if any, this difference might be, the fact remains that in this case no exception upon any ground was taken to the ultimate facts or findings upon which the judgment is based.

The only question, therefore, presented by the record upon this branch of the case is the admissibility of the evidence, and the answer is brief.

Part of the evidence, consisting of the official communications of June 7, 1895 (record, p. 26), April 18, 1901 (record, p. 31), and February 7, 1898 (record, p. 37), was offered to prove the allegations in defendant's answer with respect to, and to explain, his decision of July 3, 1901. It will be observed that not only does that decision (record, p. 24) in terms refer to and quote from the said official communication of April 18, 1901, which in turn expressly refers to the other and preceding communications thus offered in evidence, but the defendant's answer specifically recites (record, p. 11) that it was "upon full consideration" of relator's application and his proofs and of "such other evidence and proofs bearing thereon as was embodied in the public records and files of the Indian Bureau and in the Department of the Interior" that the decision in question was reached.

These communications, therefore, were part of the record of the case before the Secretary and upon which his decision was reached and based. The scope and meaning of a judgment or decision may always be ascertained by examination of the pleadings, evidence, findings, or other portions of the record. *Last Chance Mining Co.* v. *Tyler Mining Co.* (157 U. S., 683, 690); *Baker* v. *Cummins* (181 U. S., 117); *National Foundry and Pipe Works* v.

Oconto Water Supply Co. (183 U. S., 216, 234). The admissibility of this evidence is therefore obvious.

The Commissioner's letter of April 18, 1901, considers exhaustively and in detail the history of the relator's relations with the Wichita band of Indians. Therefrom it appears that on February 7, 1898, Secretary Bliss, predecessor in office of this defendant in error, concurring in the recommendation of the Commissioner of Indian Affairs in the letter of June 7, 1895, expressly and pointedly disapproved the applications for admission to the tribes of 29 persons, as voted upon by the Indians, for and against, and among the number was relator, who claims membership with the Wichita Indians by marriage and adoption long prior to 1891. The erroneous enrollment of relator on the Wichita grass-payment rolls is also therein related. The history of the case is amplified by the letters of June 7, 1895, and February 7, 1898. Concurring in the Commissioner's repeated recommendation of April 18, 1901 (record, p. 37), and in view of the situation disclosed by the correspondence in question, taken in connection with all other data then before him, this defendant in error set a second veto upon relator's adoption and decided that he was not a member of the tribe and therefore not entitled to an allotment.

The defendant also offered in evidence duly certified copies of letters of the Secretary of the Interior, dated December 13, 1884, and September 8, 1900, and of the Commissioner of Indian Affairs, dated February 27, 1886, April 3, 1894, and September 30,

1901, respectively (record, p. 38 et seq.), merely to show what had long been the views and practice of the Department and Indian Office with respect to tribal adoptions; and their admission could not have been prejudicial to relator upon the issue of fact.

Certified copies of paragraph 162 of the revised official regulations of the Indian Department, approved September 22, 1884, paragraph 157 of the revised regulations, approved December 28, 1893, and paragraph 327 of those approved March 1, 1904 (record, pp. 25–26), were offered in evidence merely as a convenient means of bringing them to the attention of the court. As official regulations of the executive department they were judicially cognizable (*Caha* v. *United States*, 152 U. S., 211, 221), and therefore no error can be predicated on their admission in evidence.

The letters last mentioned and the official regulations were properly receivable in evidence for the purpose, as they were offered, of exhibiting to the court the departmental construction of the statutes under which the Secretary had acted in relator's case and the long-continued practice in that respect. Even if inadmissible, their reception did not prejudice the relator, as they were not introduced or considered with reference to any disputed question of fact, but were introduced solely for the purpose of assisting the court upon the legal question there involved.

As was the case before the Court of Appeals, the brief of counsel for relator contains a general discussion of the question of the power and authority of the Sec-

retary of the Interior to supervise and control these Indian adoptions. As has been pointed out, this question is not raised upon the present record. It was prominent in the case before the trial court and, as appears in the opinion of the trial justice (record, p. 21), he ruled, at the request of counsel for the defendant, as matter of law—

> that before any person can be entitled to an allotment of land under the act of Congress approved March 2, 1895, ratifying the agreement of June 4, 1891, as an adopted member of the Wichita or any affiliated band of Indians, such person must show that his adoption as such member has been approved by the Secretary of the Interior.

As counsel for the relator saved no exception to this ruling of the trial court, they are to be deemed as having acquiesced and are bound by it. In view of their argument upon the subject, however, and as the question is one of manifest importance, upon which the Court of Appeals expressed its opinion and which this court may deem it proper to consider, it will be discussed in these pages at some length.

JURISDICTION AND AUTHORITY OF THE SECRETARY.

The Indian tribes sustain relations of complete dependency toward the United States, are wards of the Government, and are subject to such full control as may be prescribed by the sovereign guardian.

In the early case (1831) of *Cherokee Nation* v. *Georgia* (5 Pet., 1, 16–17) Chief Justice Marshall, speaking for the court, said:

> The condition of the Indians in relation to the United States is perhaps unlike that of any

other two people in existence. In the general, nations not owing a common allegiance are foreign to each other. The term "foreign nation" is, with strict propriety, applicable by either to the other. But the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else.

* * * * *

They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile, they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.

They look to our Government for protection; rely upon its kindness and its power; appeal to it for relief to their wants, and address the President as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory and an act of hostility.

In *United States* v. *Kagama* (118 U. S., 375, 383–438) it is said:

> These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States; dependent largely for their daily food; dependent for their political rights.

> They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.

Speaking of this relationship, the court, in *Choctaw Nation* v. *United States* (119 U. S., 1, 27), said:

> The United States is a sovereign nation, not suable in any court except by its own consent, and upon such terms and conditions as may accompany that consent, and it is not subject to any municipal law. Its government is limited only by its own constitution, and the nation is subject to no law but the law of nations. On the other hand, the Choctaw Nation falls within the description in the terms of our Constitution, not of an independent state or sovereign nation, but of an Indian tribe. As such, it stands in a peculiar relation to the United States. It was capable under the terms of the Constitution of entering into treaty relations with the Government of the United States, although, from the nature of the case, subject to the power and authority of the laws of the United States when Congress should choose, as it did determine in the act of March 3, 1871, embodied in section 2079 of the Revised Statutes, to exert its legislative power.

In *Cherokee Nation* v. *Kansas Railway Co.* (135 U.S., 641, 653–655) it is said:

> The proposition that the Cherokee Nation is sovereign in the sense that the United States is sovereign, or in the sense that the several States are sovereign, and that that nation alone can exercise the power of eminent domain within its limits finds no support in the numerous treaties with the Cherokee Indians, or in the decisions of this court, or in the acts of Congress defining the relations of that people with the United States. From the beginning of the Government to the present time they have been treated as "wards of the nation," "in a state of pupilage," "dependent political communities," holding such relations to the General Government that they and their country, as declared by Chief Justice Marshall in *Cherokee Nation* v. *Georgia*, 5 Pet., 1, 17, "are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States that any attempt to acquire their lands or to form a political connection with them would be considered by all as an invasion of our territory and an act of hostility." It is true, as declared in *Worcester* v. *Georgia*, 6 Pet., 515, 557, 569, that the treaties and laws of the United States contemplate the Indian Territory as completely separated from the States and the Cherokee Nation as a distinct community, and (in the language of Mr. Justice McLean, in the same case, p. 583) that "in the executive, legislative, and judicial branches of our Government we have admitted,

by the most solemn sanction, the existence of the Indians as a separate and distinct people, and as being vested with rights which constitute them a State or separate community." But that falls far short of saying that they are a sovereign State, with no superior within the limits of its territory.

By the treaty of New Echota, 1835, the United States covenanted and agreed that the lands ceded to the Cherokee Nation should at no future time, without their consent, be included within the territorial limits or jurisdiction of any State or Territory, and that the Government would secure to that nation "the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government of the persons and property within their own country, belonging to their people, or such persons as have connected themselves with them;" and, by the treaties of Washington, 1846 and 1866, the United States guaranteed to the Cherokees the title and possession of their lands, and jurisdiction over their country. (Revision of Indian Treaties, pp.65, 79, 85.) But neither these nor any previous treaties evinced any intention upon the part of the Government, to discharge them from their condition of pupilage or dependency, and constitute them a separate, independent, sovereign people, with no superior within its limits. This is made clear by the decisions of this court, rendered since the cases already cited. In *United States* v. *Rogers* (4 How., 567, 572), the court, referring to the

> locality in which a particular crime had been committed, said: "It is true that it is occupied by the tribe of Cherokee Indians. But it has been assigned to them by the United States as a place of domicile for the tribe, and they hold and occupy it with the assent of the United States, and under their authority. * * * We think it too firmly and clearly established to admit of dispute that the Indian tribes residing within the territorial limits of the United States are subject to their authority."

In *Stephens* v. *Cherokee Nation* (174 U. S., 445, 486–488), after quoting the utterances of the court in the preceding cases with respect to the control of the Government over the Indians and their affairs, it was added:

> Such being the position occupied by these tribes (and it has often been availed of to their advantage), and the power of Congress in the premises having the plenitude thus indicated, we are unable to perceive that the legislation in question is in contravention of the Constitution.

By the act of June 10, 1896, the Dawes Commission was authorized "to hear and determine the application of all persons who may apply to them for citizenship in said nations, and after such hearing they shall determine the right of such applicant to be so admitted and enrolled," but it was also provided:

> "That in determining all such applications said Commission shall respect all laws of the several nations or tribes, not inconsistent with the laws of the United States, and all treaties

with either of said nations or tribes, and shall give due force and effect to the rolls, usages, and customs of each of said nations, or tribes:

And provided further, That the rolls of citizenship of the several tribes as now existing are hereby confirmed, and any person who shall claim to be entitled to be added to said rolls as a citizen of either of said tribes, and whose right thereto has either been denied or not acted upon, or any citizen who may within three months from and after the passage of this act desire such citizenship may apply to the legally constituted court or committee designated by the several tribes for such citizenship, and such court or committee shall determine such application within thirty days from the date thereof."

* * * * *

We repeat that in view of the paramount authority of Congress over the Indian tribes, and of the duties imposed on the Government by their condition of dependency, we can not say that Congress could not empower the Dawes Commission to determine, in the manner provided, who were entitled to citizenship in each of the tribes and make out correct rolls of such citizens, an essential preliminary to effective action in promotion of the best interests of the tribes. It may be remarked that the legislation seems to recognize, especially the act of June 28, 1898, a distinction between admission to citizenship merely and the distribution of property to be subsequently made, as if there might be circumstances under which

the right to a share in the latter would not necessarily follow from the concession of the former.

In the more recent case of *Lone Wolf* v. *Hitchcock* (187 U. S., 553, 565–568) the court said:

> Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the Government. Until the year 1871 the policy was pursued of dealing with the Indian tribes by means of treaties, and, of course, a moral obligation rested upon Congress to act in good faith in performing the stipulations entered into on its behalf. But, as with treaties made with foreign nations (Chinese Exclusion Case, 130 U. S., 581, 600), the legislative power might pass laws in conflict with treaties made with the Indians. (*Thomas* v. *Gay*, 169 U. S., 264, 270; *Ward* v. *Race Horse*, 163 U. S., 504, 511; *Spalding* v. *Chandler*, 160 U. S., 394, 405; *Missouri, Kansas and Texas Ry. Co.* v. *Roberts*, 152 U. S., 114, 117; *The Cherokee Tobacco*, 11 Wall., 616.)
>
> The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the Government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so. When, therefore, treaties were entered into between the United

> States and a tribe of Indians it was never doubted that the *power* to abrogate existed in Congress, and that in a contingency such power might be availed of from considerations of governmental policy, particularly if consistent with perfect good faith toward the Indians.
>
> * * * * *
>
> In view of the legislative power possessed by Congress over treaties with the Indians and Indian tribal property, we may not specially consider the contentions pressed upon our notice that the signing by the Indians of the agreement of October 6, 1892, was obtained by fraudulent misrepresentations and concealment; that the requisite three-fourths of adult male Indians had not signed, as required by the twelfth article of the treaty of 1867, and that the treaty as signed had been amended by Congress without submitting such amendments to the action of the Indians, since all these matters, in any event, were solely within the domain of the legislative authority and its action is conclusive upon the courts.

It is true that for a considerable period of time the Indian tribes were dealt with as occupying a *quasi* independent position, in that treaties were negotiated with them. Experience having eventually demonstrated the impolicy of this course, however, a wide departure in the scheme of their government was determined upon. Direct general control and guardianship over the Indians were assumed by a provision of the act of March 3, 1871 (16 Stat., 544, 566), after-

wards substantially incorporated into the Revised Statutes as section 2079, as follows:

> No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March third, eighteen hundred and seventy-one, shall be hereby invalidated or impaired.

By the foregoing decisions, which are thus set forth for the convenience of the court, the dependency of the Indian tribes and their subjection to Federal control are defined as without limitation; and such plenitude of supervision was the object of the statute. The specific restrictions laid upon the Indians from time to time and from time to time upheld by the courts, with respect to their tribal relations and tribal affairs, only serve to emphasize the principle that their right of management and regulation of their internal affairs depends upon the extent of the exercise of the authority vested in the Federal Government. Among these affairs tribal adoptions are of manifest importance, as intimately affecting, for better or worse in individual cases, the welfare of the Indians, and obviously of serious concern to the Government as the guardian.

Not with respect to all matters arising out of their tribal or domestic relations has the Government sought to interfere, but has given its express or implied sanction to their own regulation of many such

matters. That a stranger can not acquire the status of a tribal Indian, by marriage or adoption, without the Federal sanction has been held by the Supreme Court of Montana, in the case of *Stiff* v. *McLaughlin* (48 Pac. Rep., 232, 234), an action brought against the sheriff of Missoula County and his bondsmen because of his refusal to levy an execution upon the property of a judgment debtor (Sloan) in the latter's possession on the Flathead Indian Reservation in that county, which refusal it was sought to justify on the ground that Sloan was a quarter-blood Chippewa, married to an Indian woman of the Flathead tribe and residing with his wife on the Flathead Reservation with the consent of the United States, the court saying:

> The marriage of a man not an Indian to an Indian woman does not give him the status of a tribal Indian, nor does he acquire such a status from the fact that he resides upon an Indian reservation with an Indian wife. Unless in the Government's treaty with the Flathead Indians themselves, or under some act of Congress, a right was expressly given the Flathead Indians to adopt persons other than tribal Indians of Washington Territory into their tribe, no court would be justified in holding that any such right existed. Their treaty gave no such right to the Flatheads as we have stated, and we know of no law conferring any such right. Nor from the fact that the United States authorities permitted Sloan to reside on the reservation can it be reasonably inferred that he had acquired, or that it was intended by the Government that he should acquire, the status of a tribal Indian.

Adoptions by the Wichita and affiliated bands of Indians, or either of them, are subject to approval or disapproval by the Secretary of the Interior under the jurisdiction and authority expressly conferred, and the duty laid, upon him by law.

In their brief here (p. 20), as in their argument below, counsel for relator concede the unqualified power of Congress with respect to the Indian tribes generally, but deny the delegation of any such power to the Secretary of the Interior. At page 29 of their brief they contend "that the executive officers of the United States Government have no inherent right to sit in judgment upon the question of tribal membership, but that the tribe itself is supreme as to that question, as it is admitted to have been in the early history of America, and that such right of supervision as may now be claimed to exist must exist alone by virtue of some law of Congress as to that particular tribe, or some treaty between that tribe and the United States conferring such authority."

The Secretary of the Interior, be it said, has not sought to exercise the unlimited powers of which Congress is the repository; and the present question is solely as to his power and authority to place an effective veto upon relator's adoption by the Wichita Indian tribe. To hold that this power and authority may not lawfully be conferred upon him would be to present the anomaly of legislation by Congress, the legislative, not the administrative, branch of the Government, upon a subject within its unquestioned province and absolute control, which can not be executed and administered by the coordinate department, or its

representative, empowered and charged with such duties under the Constitution. The inquiry, then, passes naturally to the existing legislation.

The jurisdiction and authority of the Secretary respecting these Indian matters are defined by sections 441 and 463, Revised Statutes, as follows:

> SEC. 441. The Secretary of the Interior is charged with the supervision of public business relating to the following subjects:
>
> * * * * *
>
> Third.—The Indians.
>
> * * * * *
>
> SEC. 463. The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs, and of all matters arising out of Indian relations.

Counsel for relator, at page 18 of their brief, seek to avoid the effect of, and qualify, these provisions by urging that the word "relations," in section 463, is to be interpreted as having in contemplation only those subsisting between the Indians and the Government, and none purely internal. To support their contention the cases of *Sah Quah* (31 Fed. Rep., 327), *United States* v. *Kagama* (118 U. S., 375), and *Earl* v. *Godley* (44 N. W. Rep., 254), and an opinion by the Attorney-General (20 Opin., 711), are cited and certain utterances of the courts and the Attorney-General therein, in apparent recognition of the right of tribal self-government with respect to internal or

domestic affairs, are quoted. These quotations, however, standing alone, are wholly misleading, the judicial utterances suggesting conclusions opposite to those reached.

In neither of the cases nor the opinion was either of the sections in question mentioned or any exercise of authority thereunder the subject of controversy or consideration. Even without reference to the facts to which they were addressed, these utterances palpably are with respect to what had been, or was understood to have been, the indulgence of the Government toward the Indians generally. In none of them is a right of self-government in respect of any matter held to be inviolable in the Indians as against the Federal authority.

The sections in question are not susceptible of the forced and narrow construction contended for by connsel. To sustain that construction would be to interpolate the last clause of section 463 and to ignore altogether the preceding clause, which invests the Secretary with the "management of *all Indian affairs*"—a modification of those provisions which would amount to positive legislation. If any such qualification had been intended by Congress, apt words for that purpose could easily and would have been added.

By those sections of the statutes the Secretary is expressly charged and commissioned by Congress with the management of all affairs of the Indians and of all matters arising out of their relations. The language employed is unqualified and comprehensive and the

authority conferred is wide. "Management" involves the exercise of judgment, to be expended in the ascertainment and conservation of the interests of the Indians and the Government. In the discharge of his duty to this end, that unfit persons may not impose themselves upon the Indians, and that the latter may not by indiscriminate adoptions improvidently divide and subdivide their substance and multiply the burdens of the General Government as the guardian, the Secretary has found it necessary, in the exercise of his authority concerning the Indian affairs and relations, to supervise and regulate these adoptions.

Obviously, if one such adoption can be made any number can be made and the tribe doubled or trebled in number, or increased in any greater degree, all of whose added members might then lay claim to equal shares in the tribal property and to the special care and protection of the Government. It has not been sought by the Secretary to assume the active functions of the Indians themselves. With them remains the initiative—the right and choice of its exercise, as they will. The action of the Secretary in any such case is supervisory and regulatory, either in approval or disapproval, merely. That it is within the executive province, under the broad authority conferred, is clear. If the Secretary is without this power and authority, then he has not "the management of *all Indian affairs* and of *all matters* arising out of Indian relations" with which the statute professes to endow him.

In this connection it was said by the Court of Appeals, in the course of its later opinion in this case (26 App. D. C., 290, 295):

> Congress having given very general powers to the Secretary of the Interior to deal with the Indians, we think that he is empowered to provide that an adoption by an Indian tribe of a person not an Indian must be approved by the Secretary of the Interior or his subordinate, the Commissioner of Indian Affairs. This is a proper regulation and one in the interest of the Indians. But, in the absence of any such regulation at a time when adoption is claimed, still the power to inquire into and decide that question is given by the agreement under which allotment is claimed by the relator.

But counsel again refer (brief, p. 8) to the following expression in the original opinion of the Court of Appeals (19 App., D. C., 333, 342–343), to the effect that no denial of relator's adoption had been made and that—

> none well could be made in view of the well-established custom of the Indians for over two hundred and fifty years to admit white men into membership of their several tribes by the process of adoption, and in view of the uniform recognition of this custom by the Government of the United States.

It is to be borne in mind, however, that the case was on that occasion before the court on the petition and demurrer, the allegations of the former being

taken as conceded by the latter to be true. Among them was the allegation that relator had since his marriage in all particulars and respects been treated and recognized as a member of the Wichita tribe both by the Indians and by the constituted authorities of the United States.

In speaking of the "well-established custom of the Indians for over two hundred and fifty years to admit white men into membership of their several tribes by the process of adoption," Mr. Justice Morris merely stated an historical fact; and his reference to "the uniform recognition of this custom by the Government of the United States" follows as an element of the general proposition. But here is a case, as shown by the present pleadings and evidence, in which this recognition not only has not been accorded but has twice been refused.

It has been argued by counsel for relator that the assertion on the part of the Secretary of the Interior of the right to regulate and control Indian adoptions is a new doctrine, and averring that express provision for such control was not made prior to the official regulations approved December 28, 1893 (record, p. 25), a time subsequent to relator's claimed marriage and adoption, they contend that no retroactive effect can be given that provision of the regulations and that no such control can be exercised in his case.

In their premises counsel are in manifest error, and their contentions made in this behalf are wholly untenable. For the express purpose of proving, as herein-

before indicated, that the right of approval and disapproval of such adoptions was openly declared and exercised long prior to relator's claimed marriage and adoption by vote of the Indians, the defendant Secretary introduced in evidence at the trial the certified copies of the correspondence exhibited on pages 38–44 of the transcript of the record, which, as will be seen, goes back to the year 1884—in fact, discloses that permission to adopt white men was on one occasion denied the Indians as long ago as 1873. The absence, in any event, of a formal official regulation on the subject could have no effect upon the question. Obviously the power and authority of the Secretary to regulate and control these Indian adoptions flow from no official regulation by him to that effect, but, on the contrary, the virtue of the regulation rests upon the authority vested in him by law to exercise such supervision and control.

That the Indians themselves understood and considered their action to be subject to review by the Secretary will appear by reference to that portion (found on page 34 of the transcript of the record) of the communication of the Commissioner of Indian Affairs, April 18, 1901, to the Secretary of the Interior, wherein the latter was officially advised that, through the Indian agent, the Indians had unanimously expressed the wish that the adoption of relator, as voted upon by them in general council, "receive the approval of the Department and that his name be duly enrolled as a member of the Wichita tribe of the affiliated bands." This

recognized right of review and control may therefore be said to have become a part or feature of the Indian custom in this particular.

The now long-continued practice, established by the evidence, of thus regulating and controlling these Indian adoptions, pursuant to the executive interpretation of the sections of the Revised Statutes in question, will not be disturbed by the courts unless manifestly erroneous. *United States* v. *Finnell* (185 U. S., 236, 243–244); *Hawley* v. *Diller* (178 U. S., 476, 488); *United States* v. *Johnston* (124 U. S., 236, 253); *United States* v. *Moore* (95 U. S., 760, 763); *United States ex rel. Wedderburn* v. *Bliss* (12 App. D. C., 485). The authorities upon this point are numerous.

The unqualified provisions of sections 441 and 463, Revised Statutes, fully embrace the authority exercised in this instance, and clearly were designed to avoid the necessity for specific legislation with respect to each of the multitude of matters daily arising in the course of administration.

United States v. *Macdaniel* (7 Pet., 1) furnishes an instance and a clear exposition of the principle. The Government sued to recover from the defendant, who, while a clerk in the Navy Department at an annual salary, had acted as agent for the payment of money due to navy pensioners and also as special agent for the navy disbursements upon a special allowance of commissions for such services by direction of the Secretary of the Navy, it being contended at the bar that

he had no right by law to the commissions. Said this court (pp. 14–15):

> A practical knowledge of the action of any one of the great Departments of the Government must convince every person that the head of a Department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law; but it does not follow that he must show a statutory provision for everything he does. No government could be administered on such principles. To attempt to regulate, by law, the minute movements of every part of the complicated machinery of government would evince a most unpardonable ignorance on the subject. Whilst the great outlines of its movements may be marked out and limitations imposed on the exercise of its powers, there are numberless things which must be done that can neither be anticipated nor defined, and which are essential to the proper action of the Government. Hence, of necessity, usages have been established in every Department of the Government which have become a kind of common law and regulate the rights and duties of those who act within their respective limits.

The case of *Dastervignes* v. *United States* (122 Fed. Rep., 30) directly involved a regulation by the Secretary of the Interior prohibiting the pasturing of sheep and goats on the public lands in forest reser-

vations, with respect to which the circuit court of appeals for the ninth circuit said in part (pp. 34–35):

> The Secretary, by adopting this rule, acted simply as the arm that carries out the legislative will. He did not invade any of the functions of Congress. He did not make any law, but he exercised the authority given to him, and made rules to preserve the forests on the reservations from destruction. Such rules, within constitutional limits, have the force and effect of law, and it is the duty of courts to protect and enforce them in order to uphold the law as enacted by Congress. As was said by the court in Locke's Appeal (72 Pa., 491, 499, 13 Am. Rep., 716):
>
> "To deny this would be to stop the wheels of Government. There are many things upon which wise and useful legislation must depend which can not be known to the law-making power, and must, therefore, be a subject of inquiry and determination outside of the halls of legislation."
>
> The national courts have universally upheld and sustained such rules and regulations made by its administrative officers, under the authority given by an act of Congress, whenever made necessary to carry out and enforce the provisions of the law. "It is a general principle of law, in the construction of all powers of this sort, that, where the end is required, the appropriate means are given." (*United States* v. *Bailey*, 9 Pet., 238, 255, 9 L. Ed., 113.) There are many acts of Congress

which are regulated by direct legislation, wherein general provisions are made concerning the subject-matter thereof, and in such acts, wherever it becomes necessary so to do, authority may be conferred and power given to an administrative officer, who is required by the law to act under its general provisions, to prescribe the details which must be pursued in the execution thereof, for, as was said by Chief Justice Marshall in *Wayman* v. *Southard* (10 Wheat., 1, 43, 6 L. Ed., 253), "Congress may certainly delegate to others powers which the legislature may rightfully exercise itself."

The views upon this subject, which we have briefly expressed, are sustained by numerous authorities: *Field* v. *Clark*, 143 U. S., 649, 693, 12 Sup. Ct., 495, 36 L. Ed., 294; *Caha* v. *United States*, 152 U. S., 212, 222, 14 Sup. Ct., 513, 38 L. Ed., 415; *Bushnell* v. *Leland*, 164 U. S., 684, 685, 17 Sup. Ct., 209, 41 L. Ed., 598, and authorities there cited; *Railway Co.* v. *Ohio*, 165 U. S., 365, 17 Sup. Ct., 357, 41 L. Ed., 747; *United States* v. *Ormsbee* (D. C.), 74 Fed., 207, 209; *United States* v. *City of Moline* (D. C.), 82 Fed., 592, 598; *Grady* v. *United States*, 39 C. C. A., 42, 98 Fed., 239; *Chatfield* v. *City of New Haven* (C. C.), 110 Fed., 788, 792.

Whatever intimately affects the tribal condition of the Indians touches the interest of the guardian government, invokes "supervision" by the Secretary as "public business relating to * * * the Indians," and is within the scope of his "management of all Indian affairs and of all matters arising out of Indian relations."

The case of *Sloan* v. *United States* (95 Fed. Rep., 193), cited by counsel, was a suit brought by Sloan in the Circuit Court for the District of Nebraska, pursuant to the actof Augnst 15, 189[illegible] (28 Stat., 305), which authorized the institution of any such suit by "persons who are in whole or in part of Indian blood or descent," entitled or claiming to be entitled to an allotment of land under any law of, or grant by, Congress, or claiming to have been unlawfully denied such allotment. Sloan, a mixed-blood Omaha Indian, claimed to be entitled to allotment of a certain tract, which he had improved, under the acts of Congress providing for allotments in severalty "to the Indians of said tribe," and which had been denied him by the agents and officials of the Land Department on the ground that he was not within the class of beneficiaries contemplated by the grant.

Under the special jurisdiction conferred by the act first mentioned the court held, *inter alia*, that the granting act did not distinguish between Indians of the whole and of mixed blood. Indeed, the jurisdictional act, which authorized suit by "all persons who are in whole or in part of Indian blood or descent," might have been taken as a legislative interpretation of the granting act, and was distinctly a legislative recognition of the jurisdiction of the executive authorities in the first instance to determine who were entitled to participate in the benefits of the grant. But, again, no question of adoption or of the executive authority to regulate and control it was involved.

The case of *Jones* v. *Meehan* (175 U. S., 1), which counsel cite as of controlling force here, is not at all in point. That controversy involved as its basis a tract of land the fee simple to which, without limitation or restriction of any character, it was held, had passed out of the United States by grant to one Moose Dung, a principal chief of the Red Lake band of Chippewa Indians, at whose death the title, in accordance with what was determined upon the evidence adduced in the case before a special examiner to be the established and recognized tribal custom in that particular, descended to and vested exclusively in his eldest son and successor as chief, also called Moose Dung, between whose successive lessees the controversy arose. This court held that the title had *vested* in that son, and that the rights acquired under his lease to the plaintiff in the suit could not be divested by any subsequent action of the lessor, or of Congress, or of the Executive Departments; but, it should be observed, the determination by the Secretary of the Interior concerning the title (with a direction for the distribution of the rents and profits of the land among the several surviving children of Moose Dung the elder), antedating the judicial inquiry and determination, was based wholly upon a different *finding* with respect to the tribal customs governing descents, made by the local Indian agent whose investigation was undertaken at the direction of the Commissioner of Indian Affairs. Upon the ground thus afterwards traversed in the judicial proceeding, touching the question of the tribal customs

by which such descents were cast, therefore, the determinative element of the case was ascertained and held to be a vested, indefeasible estate in fee simple in Moose Dung the younger; and with such estates not only the Secretary of the Interior, but, the court significantly added, Congress itself could not in any manner interfere.

The case of *Nofire* v. *United States* (164 U. S., 657), also cited and relied upon by counsel, is equally out of point. In that case the judgment of the United States Circuit Court for the Western District of Arkansas, wherein the plaintiffs in error (Cherokee Indians) had been convicted of the murder of a white man "at the Cherokee Nation in the Indian country," was reversed upon proof in the record of the prior adoption of the deceased by the Cherokee Nation, by reason whereof the jurisdiction of the Federal Court was ousted. That case is widely distinguishable from the present in that, *inter alia*, no question was made of the *validity* of that adoption at the hands of the Cherokee Nation alone, which the executive had in no wise sought to control, the right of practically unrestricted self-government having been secured to that nation by formal treaties with the United States, notably that of 1835 (7 Stat., 478), preserved under the saving clause of section 2079, Revised Statutes, and thereafter recognized by provisions contained in the acts of May 2, 1890 (26 Stat., 81, 96), and June 7, 1897 (30 Stat., 62, 84), the latter subsequent to the decision in question. The position of the Wichita and affiliated bands of Indians is far

short of that occupied by the Cherokees, one of the Five Civilized Tribes (Choctaws, Chickasaws, Cherokees, Creeks, and Seminoles), all of whom enjoy substantially the same rights and privileges.

The same distinction applies with respect to the cases of *Turner* v. *Fish* (28 Miss., 306), *United States* v. *Rogers* (4 How., 567), *Roff* v. *Burney* (168 U. S., 218), *Stephens* v. *Cherokee Nation* (174 U. S., 445), and manuscript decisions in *Senter* v. *Choctaw Nation* and *Tucker* v. *Choctaw Nation*, also cited by counsel, so far as they in any sense relate to this phase of the case.

O'Brien v. *Bugbee* (26 Pac. Rep., 428) involved only the descent of a tract of land, situate in the State of Kansas, which was held to have been cast by the customs of the Shawnee Indian tribe, recognized by the United States, and not by the laws of the State.

The case of *Seneca Nation* v. *Lehley* (8 N. Y. Sup., 245) involved a dispute as to whether a certain tract of the lands of the Seneca Nation of Indians, held by them under certain provisions of the New York statutes as a distinct community, had been laid out or set apart in accordance with the statutory authority given the chiefs, and whether the statutory prohibition against alienation except to another Indian of the nation operated to exclude a half-breed from succession in interest. The laws of New York only were involved, no question of Federal authority being present.

The power and authority to determine what persons are entitled to allotments under Article II of the

agreement (Appendix) must necessarily rest with some officer or tribunal; and in the absence of other designation it follows that Congress intended the exercise of jurisdiction to that end by the tribunal or authority having supervision and control of the Indians and their affairs, as well as with respect to the disposition of the relinquished lands, by the authorities having control of such matters. *Bishop of Nesqually* v. *Gibbon* (158 U. S., 155, 167); Indian Allotments (28 L. D., 564, 567, 568).

The sale and disposition of the public domain is under the jurisdiction of the Commissioner of the General Land Office, subject to the direction of the Secretary of the Interior. Sec. 453, Revised Statutes; *Knight* v. *U. S. Land Association* (142 U. S., 161, 177).

The selection of allotments under Article II of the agreement is not complete until "approved" by the Secretary of the Interior (Article IV). The word "approved," in that connection, confers a judicial power and duty upon that officer. *Wisconsin Central R. R. Co.* v. *Price Co.* (133 U. S., 496, 511, 513); *United States* v. *Missouri &c. Ry. Co.* (141 U. S., 358, 375–376).

The regulations of the Department, pursuant to and to effectuate the authority of the Secretary, providing that tribal adoptions must have departmental approval, have the further sanction of sections 161 and 465, Revised Statutes.

In making these regulations the Secretary of the Interior was acting for the President. *Runkle* v.

United States (122 U. S., 543, 557), and authorities therein cited.

These rules and regulations, made pursuant to law, have the force and effect of law, and the courts take judicial notice of them. *United States* v. *Eliason* (16 Pet., 291, 302); *Gratiot* v. *United States* (4 How., 80, 117); *Ex parte Reed* (100 U. S., 13, 22); *Kurtz* v. *Moffitt* (115 U. S., 503); *Caha* v. *United States* (152 U. S., 211, 221); *Boske* v. *Commingore* (177 U. S., 459, 467, 470); *Cosmos Co.* v. *Gray Eagle Co.* (190 U. S., 301, 309); 21 Opin. Attorney-General, 122; *United States* v. *Barrows* (1 Abb., 351); *Low* v. *Hanson* (72 Me., 104).

It is respectfully submitted that the judgment below should be affirmed.

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APPENDIX.

Agreement ratified by the act of Congress entitled "An act making appropriations for current and contingent expenses of the Indian Department and fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, eighteen hundred and ninety-six, and for other purposes," approved March 2, 1895 (28 Stat., 876, 895–7).

Articles of agreement made and entered into at Anadarko, in the Indian Territory, on the 4th day of June, A. D. 1891, by and between David H. Jerome, Alfred M. Wilson, and Warren G. Sayre, commissioners on the part of the United States, and the Wichita and affiliated bands of Indians in the Indian Territory.

ARTICLE I.

The said Wichita and affiliated bands of Indians in the Indian Territory hereby cede, convey, transfer, relinquish, forever and absolutely, without any reservation whatever, all their claim, title, and interest of every kind and character in and to the lands embraced in the following-described tract of country in the Indian Territory, to wit:

Commencing at a point in the middle of the main channel of the Washita River, where the ninety-eighth meridian of west longitude crosses the same, thence up the middle of the main channel of said river to the

line of 98° 40′ west longitude, thence on said line of 98° 40′ due north to the middle of the channel of the main Canadian River, thence down the middle of said main Canadian River to where it crosses the ninety-eighth meridian, thence due south to the place of beginning.

ARTICLE II.

In consideration of the cession recited in the foregoing article, the United States agrees that out of said tract of country there shall be allotted to each and every member of said Wichita and affiliated bands of Indians in the Indian Territory, native and adopted, one hundred and sixty acres of land, in the manner and form as follows:

Said tract of country shall be, by the United States, classified into grazing and grain-growing land, and when so classified each of said Indians shall be required to take at least one-half in area of his or her allotment in grazing land, subject to the foregoing and other restrictions hereinafter recited. Each and every member of said Wichita and affiliated bands of Indians in the Indian Territory over the age of eighteen years shall have the right to select for himself or herself one hundred and sixty acres of land to be held and owned in severalty, but to conform to legal surveys in boundary as nearly as practicable; and that the father, or, if he be dead, the mother (if members of said tribe or bands of Indians) shall have the right to select a like amount of land, under the same restrictions, for each of his or her children under the age of eighteen years; and that the Commissioner of Indian Affairs, or some one appointed by him for the purpose, shall select a like amount of land, under the same restrictions, for each orphan child belonging to

said tribe or bands of Indians under the age of eighteen years.

It is hereby further expressly agreed that no person shall have the right to make his or her selection of land in any part of said tract of country that is now used or occupied, or that has been or may hereafter be set apart for military, agency, school, school farm, religious, town site, or other public uses, or in sections sixteen (16) and thirty-six (36) in each Congressional township, except, in cases where any member of said Wichita and affiliated bands of Indians has heretofore made improvements upon and now occupies and uses a part of said sections sixteen (16) and thirty-six (36), such Indian may make his or her selection, according to the legal subdivisions, so as to include his or her improvements. It is further agreed that wherever in said tract of country any one of said Indians has made improvements and now uses and occupies the land embracing such improvements, such Indian shall have the undisputed right to make his or her selection, to conform to legal subdivisions, however, so as to include such improvements without reference to the classification of land hereinbefore recited.

ARTICLE III.

All allotments hereunder shall be selected within ninety days from the ratification of this agreement by Congress of the United States; provided the Secretary of the Interior, in his discretion, may extend the time for making such selection; and should any Indian entitled to allotments hereunder fail or refuse to make his or her selection of land in such time, then the allotting agent in charge of the work of making such allotments shall, within the next thirty (30) days after said time, make allotments to such Indians, which

shall have the same force and effect as if the selections were made by the Indians themselves.

ARTICLE IV.

When said allotments of land shall have been selected and taken as aforesaid, and approved by the Secretary of the Interior, the titles thereto shall be held in trust for the allottees, respectively, for a period of twenty-five (25) years, in the manner and to the extent provided for in the act of Congress entitled "An act to provide for the allotment of land in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes." Approved February 8, 1887. And at the expiration of twenty-five (25) years the title thereto shall be conveyed in fee simple to the allottees, or their heirs, free from all incumbrances.

ARTICLE V.

In addition to the allotments above provided for and the other benefits to be received under the preceding articles, said Wichita and affiliated bands of Indians claim and insist that further compensation in money should be made to them by the United States for their possessory right in and to the lands above described in excess of so much thereof as may be required for their said allotments. Therefore, it is further agreed that the question as to what sum of money, if any, shall be paid to said Indians for such surplus lands shall be submitted to the Congress of the United States, the decision of Congress thereon to be final and binding upon said Indians; provided, if any sum of money shall be allowed by Congress for surplus lands, it shall be subject to a reduction for

each allotment of land that may be taken in excess of one thousand and sixty (1,060) at that price per acre, if any, that may be allowed by Congress.

ARTICLE VI.

It is further agreed that there shall be reserved to said Indians the right to prefer against the United States any and every claim that they may believe they have the right to prefer, save and except any claim to the tract of country described in the first article of this agreement.

ARTICLE VII.

It is hereby further agreed that wherever, in this reservation, any religious society or other organization is now occupying any portion of said reservation for religious or educational work among the Indians the land so occupied may be allotted and confirmed to such society or organization; not, however, to exceed one hundred and sixty acres (160) of land to any one society or organization, so long as the same shall be so occupied and used, and such land shall not be subject to homestead entry. That whenever said lands are abandoned for school purposes the same shall revert to said Indian tribes and be disposed of for their benefit.

ARTICLE VIII.

This agreement shall have effect whenever it shall be ratified by the Congress of the United States.

In witness whereof the said commissioners on the part of the United States have hereunto set their hands and the undersigned members of the said Wichita and affiliated bands of Indians have set their hands, the day and year first above written.

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